

1 APPEARANCES: (cont'g)
2 Robert A. Angle, Esquire
3 Troutman Sanders, LLP
4 1001 Haxall Point
5 Richmond, Virginia 23219
6 and
7 Daniel W. McDonald, Esquire
8 William D. Schultz, Esquire
9 Merchant & Gould, PC
10 80 South Eighth Street
11 Suite 3200
12 Minneapolis, Minnesota 55402
13 Counsel for the Defendant
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1 P R O C E E D I N G S

2

3 THE COURT: Hello.

4 MR. ANGLE: Judge, it's Robert Angle and Craig
5 Merritt on the phone.

6 THE COURT: All right. Thank you. This is ePlus
7 versus Lawson, civil 3:09CV620, and I have this letter from
8 Mr. -- I guess it's from Mr. Robertson dated April 28th. It
9 was brought over here, and I got it this morning and have read
10 it, and this needs to get resolved.

11 And I understand that there's some problem with the
12 availability of counsel for -- is it Lawson or ePlus? I'm not
13 sure.

14 MR. MERRITT: Judge, this is Craig Merritt. ePlus is
15 available.

16 THE COURT: How about Lawson, Mr. Angle? Do you know
17 what the situation is?

18 MR. ANGLE: Yes, Your Honor. We're not available at
19 three o'clock which is only time given to us, and I know that
20 there is a response to that letter that will be coming over to
21 your chambers shortly.

22 THE COURT: Well, I want to do it this afternoon. I
23 guess Mr. McDonald -- who do you have to do it for your firm?

24 MR. ANGLE: Mr. McDonald will have to do it.

25 THE COURT: Is he available at four o'clock?

1 MR. ANGLE: I can ask him.

2 THE COURT: I want him to be available as promptly as
3 possible. When is the letter coming?

4 MR. ANGLE: I should be able to get it over there in
5 the next 15, 20 minutes.

6 THE COURT: I'd like to get this addressed today,
7 because some of these depositions, it looks to me like from
8 this letter, are scheduled for Monday.

9 MR. ANGLE: I think that's right, Your Honor.

10 THE COURT: Let's see what we can sort out here, and
11 I'll wait for the letter. You set something up, three o'clock.
12 I can do it at 4:00 or 4:30, but I would really rather do it at
13 4:00.

14 MR. ANGLE: Your Honor, I will make sure that
15 somebody is available at four o'clock today.

16 MR. MERRITT: We will circulate a call-in number to
17 everybody including your court.

18 THE COURT: If Mr. McDonald is in a trial or
19 something, there's not much we can do about that, or if he's in
20 the hospital not much about that, but if he's doing anything
21 else, it looks like he can take a little break.

22 MR. ANGLE: Yes, Your Honor, I'll convey that.

23 THE COURT: Thank you all. I know you have another
24 call here in a minute. Thanks for being available on short
25 notice. Bye.

1 (Conference call ended at 1:53 p.m. and resumed at
2 3:03 p.m. as follows:)

3

4 THE COURT: Hello. This is civil 09-232, ePlus --
5 I'm sorry. I guess it's -- no. It's 09-620, isn't it?

6 THE LAW CLERK: Yes.

7 THE COURT: Mr. McDonald, you've got the wrong number
8 on yours. I was reading from yours. That's all right. That
9 happens when you rush.

10 I know you all have got short notice, short fuses on
11 the matter. You all go ahead and identify yourselves for the
12 record starting with counsel for the plaintiff and who you
13 represent, and then when you talk, give your name only. Go
14 ahead.

15 MR. MERRITT: Craig Merritt of the Christian & Barton
16 firm for ePlus.

17 MR. ROBERTSON: Scott Robertson from Goodwin Procter,
18 Your Honor, for ePlus.

19 MR. McDONALD: Good afternoon, Your Honor. Dan
20 McDonald and Will Schultz for Lawson.

21 MR. ANGLE: Your Honor, this is Robert Angle. I'm
22 also on the phone for Lawson.

23 THE COURT: I've read the letter from Mr. Robertson
24 dated April 28th and the letter from Mr. McDonald dated April
25 29, and you all seem to have substantially different views,

1 almost polar opposite views, of the same facts, and that's kind
2 of hard for me to understand.

3 The bottom line, as I read it, is that ePlus contends
4 that nine witness's were identified after the date when they
5 were supposed to be identified, April 9, 2010, and that
6 Lawson -- and they are all fact witnesses. And Lawson
7 identifies a number of witnesses, some identified after that
8 period. There's a fellow named Jacobs identified in mid April,
9 fellow name Parsells on April 16, and a fellow named O'Connell
10 on April 23rd.

11 As to the rest of them, I don't see any date, and
12 that is Capocelli, Ramos, Staats. I don't see any dates when
13 they were disclosed as people you were going to call in your
14 letter, Mr. McDonald. You seem to be saying that these people
15 previously had testified in the SAP trial in 2006, but I don't
16 see when they were disclosed that you were going to call them
17 here. So what's the problem here, folks? If these --

18 MR. McDONALD: Your Honor, can I clarify on the dates
19 of the disclosure of the people you listed?

20 THE COURT: Sure.

21 MR. McDONALD: This is Mr. McDonald.

22 THE COURT: Capocelli when?

23 MR. McDONALD: Capocelli was April 9th as agreed.

24 THE COURT: All right. Ramos?

25 MR. McDONALD: April 9th as agreed.

1 THE COURT: Jacobs?

2 MR. McDONALD: April 9th as agreed.

3 THE COURT: Now, your letter says you didn't even
4 become aware of him until mid April. First sentence says,
5 Lawson was not aware of Jacobs until mid April when Lawson's
6 counsel spoke with Jesus Ramos and learned that Mr. Jacobs
7 would be a helpful witness on the Gateway system prior art.

8 So what you have here is inconsistent with April 9th.
9 What's the reason for the inconsistency?

10 MR. McDONALD: Your Honor, I think we found out about
11 him right at April 9th, basically when we talked to Mr. Ramos,
12 so when I said mid April, maybe that was a little fuzzy. It
13 may be April 9th, early to mid April. We found out about him,
14 if it wasn't that day, it was like within 24 hours of April 9th
15 when we sent this letter.

16 THE COURT: So it was April 9th and 10th.

17 MR. McDONALD: April 8th or 9th.

18 THE COURT: 8th or 9th?

19 MR. McDONALD: Yes, Your Honor.

20 THE COURT: Staats? I don't see any disclosure date
21 there.

22 MR. McDONALD: Mr. Staats was in the same letter on
23 the agreed date of April 9th.

24 THE COURT: Parsells you say April 16th.

25 MR. McDONALD: That's right. He was not in the

1 April 9th letter. He was the one that we found out about when
2 we found out that one of the other witnesses, or potential
3 witnesses, at least we thought a potential witness, had
4 deceased, and we talked to his widow. That's how we found out
5 about Mr. Parsells after April 9th.

6 THE COURT: O'Connell, April 23rd.

7 MR. McDONALD: Right, we basically heard about him on
8 April 23rd, talked to him on April 26th, and disclosed him on
9 April 26th based on the conversation with Ms. Fielder.

10 THE COURT: Now, that is a total of one, two, three,
11 four, five, six people, and, Mr. Robertson, you say that there
12 are 11 people, two -- or there are nine people that haven't
13 been disclosed. Who are the others?

14 MR. ROBERTSON: Your Honor, let me see if I can get
15 my handle on all these people because a lot of names have been
16 flying around, and I just want to make sure I've got this all
17 nailed down.

18 THE COURT: What I'm reading from was the bold type
19 in Mr. McDonald's letter dated the 29th of April, and he
20 gives -- there are six people, and then he says that they --
21 you identified Gounaris, Eng, and Fielder, and there's no
22 dispute about that, that they identified those people.

23 MR. ROBERTSON: I have no qualms with Mr. Gounaris
24 and Ms. Eng who were in their initial disclosures and in their
25 interrogatory answers. Initial disclosures back in August,

1 Your Honor, our interrogatory number one asked them about these
2 people. I mean this wasn't hit -- only Gounaris and Eng were
3 identified in those, Your Honor.

4 On April 9th in the court-ordered invalidity
5 contention, they identified Ms. Fielder. At the close of
6 business that day, apparently an e-mail was sent identifying
7 four others. I believe Capocelli, Ramos, and Staats were
8 identified. I think Mr. McDonald's letter says Mr. Parsells
9 was not identified until last Friday. Mr. O'Connell was not
10 identified until this past Monday.

11 THE COURT: Well, is it correct then that Staats,
12 Jacobs, Ramos, and Capocelli were identified on April the 9th?

13 MR. ROBERTSON: I think that's correct, Your Honor.
14 Let me just --

15 THE COURT: So there's no dispute about that then.

16 MR. ROBERTSON: No, sir. But let me just say, I've
17 been asking about these individuals forever in this case, and
18 Mr. McDonald is exactly right. These individuals were
19 identified in the SAP case which is all the more reason.
20 They've known about it. They've had the transcript since early
21 on.

22 If they were going to call these witnesses, I wanted
23 to know that, and I asked that, Your Honor, every opportunity I
24 had that I appeared before you either in person or
25 telephonically. And so I find out April 9th, after pressing

1 and pressing and pressing, that suddenly we're going to call
2 all these witnesses who they have known about since last
3 summer, and now I need to do it, and it's not in the
4 court-ordered invalidity contentions.

5 Your Honor, you'll recall, we had a fairly, I
6 apologize, contentious conference call a month ago, on
7 March 26th, and it's in my letter. At the time, I said, I need
8 to know who these witnesses are because I need to depose them.
9 If I depose them, it will identify other relevant witnesses
10 that I might want to call, rebuttal witnesses that I might need
11 to call.

12 Nobody was identified. I had a conference call after
13 Your Honor issued an order in which I said, who are you going
14 to call as third-party witnesses.

15 At the time, only Ms. Eng and Ms. Fielder were
16 identified, but after that, Your Honor, we had a follow-up,
17 after the April 9 invalidity contentions came out, and I told
18 Mr. McDonald at the time that we were going to object to
19 anybody else who was outside of the Court-ordered invalidity
20 contentions. That was the whole point, Your Honor, at the
21 time, when we said we need to know --

22 THE COURT: Wait a minute, Mr. Robertson. Lawson is
23 taking the position that there was an agreement to make
24 disclosure of these witnesses on April 9th and that four of
25 them were disclosed on April 9th. Is it correct or incorrect

1 that there was an agreement to disclose them on April 9th?

2 MR. ROBERTSON: Correct, Your Honor.

3 THE COURT: Sorry?

4 MR. ROBERTSON: It's correct, Your Honor.

5 THE COURT: So there was an agreement to disclose
6 them on April 9th, and all but two of them were disclosed on
7 April 9th.

8 MR. ROBERTSON: There's Mr. Lawson, Your Honor,
9 Richard Lawson, who, I guess, is the founder of Lawson who was
10 identified.

11 THE COURT: Oh, yeah, I'm sorry.

12 MR. ROBERTSON: So he's never been identified before,
13 and I guess we have a hard time, Your Honor, understanding why
14 this person, you know, was not known to Lawson's counsel prior
15 to last Friday.

16 THE COURT: So there is Mr. Lawson. That's mentioned
17 on Mr. McDonald's letter on page six at the bottom paragraph,
18 and that was on April 23rd. So I guess here's where I am. If
19 you all have agreed to have the disclosures made by April 9th,
20 then anybody that was disclosed by April 9th is something that
21 you've agreed to, and I don't need to consider that. And if
22 that's wrong, I'd like to understand why that's wrong.

23 MR. ROBERTSON: Your Honor, let me just address this.
24 I can live with that, Your Honor, and I think that's a fair
25 assessment of where we are in this thing. The only thing I

1 would ask is if there's a witness who was not going to be
2 addressing one of the seven or eight prior art references that
3 you restricted Lawson to addressing in their contentions, that
4 that witness be excluded. For example, Lawson is now raising
5 the fact they want to have a witness testify about their
6 alleged prior art system, a version 6.0, their own system.
7 It's not in the court-ordered invalidity contentions, and we
8 just think this is an argument to do an end-around of the
9 Court's order.

10 It's not proper for them to, on the one hand, not
11 give us contentions about it and the other hand say they're
12 going to call a witness to address it. I don't know if that's
13 going to be Mr. Lawson, if it's going to be another witness,
14 but if it's not in what was required by the Court's order, then
15 we think this is just a kind of patent lawyer's argument to get
16 around an article three judge's ruling, and it's not
17 appropriate.

18 So other than -- anybody identified on April 9th that
19 is included in their April 9th disclosures as ordered by the
20 Court, I'll go depose and we'll move forward on this case. I
21 would ask the Court's indulgence because I might need to name a
22 rebuttal witness or two, and I could probably do that by close
23 of business tomorrow, but I might need to do it by Monday
24 morning, because, you know, I did not anticipate having to take
25 depositions in, you know, Tulsa, Oklahoma, and Montana and

1 Texas and New Jersey in the next 13 business days.

2 MR. McDONALD: Your Honor, this is Mr. McDonald. If
3 I may respond on the Lawson system issue.

4 THE COURT: Yes.

5 MR. McDONALD: April 5th, actually even before we
6 sent out the supplemental list of witnesses, they served a
7 deposition notice on us, Lawson, specifically on the topic of
8 this prior system, this version 6.0 system, and we offered up a
9 witness on it, and then after they saw our invalidity
10 contentions, they asked us to clarify how we were going to use
11 it, which we did.

12 We explained it's relevant in a number of ways, but
13 one of them is certainly to provide prior art background
14 information here, and they've asked for that deposition since
15 April 5th. We gave them a witness, we gave them a date, and
16 then all of a sudden we had radio silence from them.

17 And so they've known for awhile and asked about him
18 in a timely fashion. We complied with the request in a timely
19 fashion, so I don't think there's any issue here about late
20 notice or prejudice regarding a witness on that old system.

21 MR. ROBERTSON: If I could just respond, Your Honor.
22 This is Mr. Robertson. Right after that deposition notice when
23 they sent us the Court-ordered invalidity contentions, they
24 said, see, Lawson 6.0 version is no longer part of our
25 invalidity contentions.

1 THE COURT: They said what about that?

2 MR. ROBERTSON: They said that the Lawson system was
3 no longer part of their invalidity contentions, and under the
4 circumstances, would you be willing to withdraw your deposition
5 notice. We said, yes. Given that it's not in the Court's
6 ordered invalidity contentions, we will withdraw it.

7 Immediately after that, they said, oh, no, we need
8 that deposition to go forward for other reasons including the,
9 quote, scope and content of the prior art and its relevance to
10 obviousness. We said, hey, that's invalidity. It's not in
11 your invalidity contentions as ordered by Judge Payne. Why
12 should we go forward with that, and they gave us a host of
13 other reasons why it was relevant.

14 Judge, I mean, it's either in or it's out. I mean,
15 if Mr. McDonald wants to represent to you right now that
16 Lawson's 6.0 version of its own software is part of its
17 invalidity contentions, I'll let him tell you that right now,
18 and then I'll show it to you, and you can decide for yourself.

19 MR. McDONALD: Your Honor, we never said we weren't
20 going to use the Lawson prior art. He's actually got it the
21 wrong way. They asked us, are you going to use 6.0, because if
22 you're not, we'll withdraw our deposition notice, and we
23 specifically told them and clarified for them that yes, we are
24 using that, so you ought to go ahead and take the deposition,
25 and here's the name and here's the date.

1 So it's actually just the opposite of that, but it
2 is, obviously, a little unique when it's Lawson's own system
3 here compared to some of this third-party prior art, so it is
4 relevant to give the scope and contents of the prior art, but
5 also, you know, there's a bit of a dilemma here because a lot
6 of these features we don't think infringe.

7 They don't infringe in our current product, they
8 don't infringe in the old product either. They are just
9 different, but we should be able to at least explain to the
10 jury, look, whether you think this feature satisfies this
11 element or not doesn't really matter because Lawson has been
12 doing that since the 1980s, and we want to be able to have the
13 right to say that, at least to give the jury that context, and
14 we made that clear.

15 Maybe they think it's a good point, so they decided
16 they wanted to try to withdraw that deposition notice from over
17 three weeks ago, but the issue here isn't prejudice or delay or
18 anything else. It's that they don't want us to put in some
19 good testimony.

20 THE COURT: The issue is whether you told them that
21 you weren't going to put it in.

22 MR. McDONALD: We never said that. We made it very
23 clear, it's background, it's prior art. It's also relevant to
24 willful or intent-based issues. It's relevant to the existence
25 of non-infringing alternative technologies, because certainly a

1 prior art system is not going to be something that's covered by
2 the patent, and, you know, we've explained actually a number of
3 ways in which that information is relevant, and we've gone on
4 record with them on that, put that in a letter.

5 THE COURT: Mr. Robertson, did I misunderstand that
6 you said they told you that the Lawson 6 system was not going
7 to be part of their invalidity case?

8 MR. ROBERTSON: Did not misunderstand me, Your Honor.
9 In fact, I'm happy to forward their invalidity contentions, and
10 if you can find the Lawson 6.0 version system anywhere in those
11 invalidity contentions that were ordered by Your Honor, then I
12 will back away from my statement right now, but it's not there,
13 Your Honor, and this is just a backdoor way to try and get it
14 in and do this. I find it ironic --

15 THE COURT: Wait a minute, Mr. Robertson. Apart from
16 the fact that the invalidity contentions do not contain the
17 Lawson 6 software, I had the impression that you were actually
18 told by someone representing Lawson, other than by its absence
19 from the invalidity contentions, you were affirmatively told
20 that they were not going to use the Lawson 6 as part of their
21 invalidity case. Did I misunderstand?

22 MR. ROBERTSON: No, sir.

23 THE COURT: Who told you and when was it?

24 MR. ROBERTSON: I believe it was -- I'm sorry, sir.
25 I believe it was Mr. McDonald's partner, Will Schultz.

1 THE COURT: What did he say and what proof do you
2 have of what he said?

3 MR. ROBERTSON: I don't have the e-mail right in
4 front of me, Your Honor, but maybe my partner, who may be on
5 the phone, Mrs. Albert, could pull it up, but I understood Mr.
6 Schultz to represent that given the fact that Lawson was not
7 relying on 6.0 version for their invalidity contentions, did we
8 still want to go forward with the deposition, and we responded
9 that, no, we didn't.

10 THE COURT: Ms. Albert, do you have that e-mail?

11 MS. ALBERT: I'm looking for it right now, but I
12 can't place my hands on it at the moment, but it is as Mr.
13 Robertson represented.

14 MR. ROBERTSON: We can forward it to Your Honor
15 within minutes, I'm certain.

16 THE COURT: Well, it looks to me like -- are we now
17 down to whether or not there's a problem with Mr. O'Connell,
18 Mr. Parsells, and Mr. Lawson? Is that where we are now?

19 MR. ROBERTSON: Mr. O'Connell is on a system, Your
20 Honor -- this is Mr. Robertson again, I apologize -- which is
21 not in their invalidity contentions. It's a system called
22 Reality. I don't think there's any dispute on their invalidity
23 contentions.

24 We think -- and that was just identified as of
25 Monday. His deposition would be in Montana. We think that

1 would be inappropriate. We will observe that Judge Spencer
2 instructed testimony from the SAP trial, but I'll leave that
3 just as an aside. I just think it's late notice.

4 THE COURT: Wait just a minute. Okay, let's take Mr.
5 O'Connell. He wasn't in the invalidity contentions, and they
6 say they learned of him on April 23rd and told you thereafter.
7 So --

8 MR. ROBERTSON: Your Honor, he was identified in the
9 SAP trial. They've known about him for 11 months.

10 THE COURT: But, I know that there's always
11 rejoinders to every word that comes out of somebody's mouth.
12 There shouldn't be, but, unfortunately, I'm still learning that
13 there are, but at this juncture, Mr. McDonald, you identified
14 this person late, and he wasn't in your -- Mr. O'Connell, and
15 he wasn't in your invalidity contentions or a system, that he's
16 going to testify to a system that wasn't in your invalidity
17 contentions, so why should you have him?

18 MR. McDONALD: This is Dan McDonald speaking. Your
19 Honor, we're not relying on him to support our invalidity
20 arguments. We're relying on him with respect to damages.
21 Arguably we could have called him in rebuttal, but the
22 situation here is that ePlus is contending that the patented
23 technology was this wonderful commercially successful
24 technology, but what Mr. O'Connell will testify to is that he
25 had his own procurement system which Fisher Scientific

1 purchased from him through an acquisition in 1999, well after
2 they purportedly came up with their own German technology.
3 It's to show that their system was not successful. He said
4 their system was a flop, and that's why they bought his system
5 out. So their system isn't worth much.

6 That's what he's here for. He's not here for
7 invalidity. Those events in 1999 actually postdate the patent,
8 so to bring this up in the context of invalidity contentions is
9 two ships passing in the night.

10 THE COURT: So he's not going to testify about
11 invalidity at all?

12 MR. McDONALD: That's right.

13 THE COURT: Now, Mr. Robertson, is there any reason
14 why he can't testify on the topic of damages?

15 MR. ROBERTSON: Well, I mean, Your Honor, I've had an
16 interrogatory out since last August, and this is the first time
17 I've ever heard this theory articulated about Mr. O'Connell.
18 You know, they've known about this gentleman for 11 months,
19 sir. It's not like he's been hidden in this case. They could
20 have identified him before 13 business days when I have to go
21 take his deposition in Montana and call a rebuttal witness,
22 Your Honor. I mean, if you're going to permit --

23 THE COURT: Wait a minute. Have they previously
24 disclosed him as a witness, as a person who has knowledge on
25 damages?

1 MR. ROBERTSON: No, sir. In fact, the first time I
2 heard of it was just this very moment. He was identified to us
3 on Monday of this week.

4 THE COURT: All right. And the topic is damages; is
5 that right, Mr. McDonald?

6 MR. McDONALD: Yes, Your Honor, it is, or the lack of
7 value of the technology. That's --

8 THE COURT: I'm not sure that's damages, is it?

9 MR. McDONALD: I think that would be primarily how he
10 would be used, but it's certainly relating to activity that
11 postdate the filing date of the patent, so we're obviously not
12 talking about prior art with him. But --

13 THE COURT: Was there a date -- is there anything
14 that controls the date for disclosure of witnesses? There's
15 the Rule 26 disclosures.

16 MR. McDONALD: I think -- what I recall, Your Honor,
17 whether it was a letter and/or court order was that -- this is
18 McDonald speaking again, I'm sorry -- that the parties have to
19 disclose witnesses in sufficient time for them to be deposed
20 before discovery closes which is May 18th.

21 THE COURT: Well, A, O'Connell is not going to
22 testify about invalidity, and, Mr. Robertson, they have a duty
23 to supplement their interrogatory answers, and they've given
24 you a short trigger on it, and is this the guy in Greenough,
25 Montana?

1 MR. ROBERTSON: Yes, Your Honor.

2 THE COURT: That's a very distant place.

3 MR. McDONALD: This is McDonald again. We did a
4 deposition this week, Your Honor, by phone, and I'm not sure
5 this guy is going to talk for more than an hour.

6 THE COURT: Well, you've got to fly into Missoula,
7 and then you drive about an hour north of Missoula to get
8 there.

9 MR. McDONALD: But we did take one by telephone where
10 none of the lawyers had to drive anywhere. We just had a court
11 reporter sitting with the witness.

12 THE COURT: That's up to you all. It looks to me
13 like -- is there any reason why he can't -- he can't testify --
14 if he testifies only as to the lack of value of the invention?
15 Mr. Robertson, if it's confined to that? Looks to me like --

16 MR. ROBERTSON: Your Honor, I understand. You know,
17 I don't think he has any value to add to that, and I'm just
18 worried it would be a back door to try to invite invalidity,
19 but I guess I can address that --

20 THE COURT: Well, if he does, I will assure you, if
21 he mentions one thing about invalidity, he'll be stopped from
22 testifying, and there will be no issue.

23 Now let's take Mr. Parsells. That was disclosed a
24 week late. Is that on invalidity or not, Mr. McDonald?

25 MR. McDONALD: Yes, Your Honor. Mr. Parsells would

1 be on the prior art system. We actually just talked to him the
2 first time on the 26th, even a couple days after we disclosed
3 him. We disclosed his name as soon as we got it from the widow
4 of this Mr. Taylor.

5 THE COURT: So it's a late-disclosed witness.

6 MR. McDONALD: Yes, but we believe we have good cause
7 for that, Your Honor.

8 THE COURT: That's because --

9 MR. McDONALD: The agreement we had did allow the
10 parties to further supplement after April 9th. I think this is
11 a quintessential example of the situation where that would be
12 appropriate. It was a name nobody heard of before until we had
13 investigated it, and immediately we disclosed it.

14 THE COURT: Well, it looks to me like that you didn't
15 talk to the widow until mid April, according to your own
16 language, so that's hardly diligent inquiry into the matter,
17 and -- I'm going to allow you to depose him, Mr. Robertson, but
18 I'm not sure he's going to come in and testify.

19 I'm going to have to hear more about why it is that
20 you all think you can put these inquiries to witnesses out and
21 then say, oh, we just discovered him. When you put them out
22 there so late, the natural result is going to be that you just
23 discover them, and then you cram everything into the back end
24 of the period.

25 So I wouldn't count on having him in, and Mr. Richard

1 Lawson, now, for the first time they say that you informed them
2 that Mr. Richard Lawson was going to be called. Why is he
3 coming to testify?

4 MR. McDONALD: This is McDonald speaking again, Your
5 Honor. Lawson has about 4,000 employees, and it was in the
6 course of developing the story on the 6.0, and we've got other
7 witnesses on that issue, I would acknowledge that, but Mr.
8 Lawson, as we talked to people who talked to other people and
9 led us to other people, found out that he was really a guy that
10 wasn't just kind of the boss of the company, but he was really
11 in the front lines there going back to even the '70s as well as
12 the '80s that had some personal knowledge of some of the facts
13 regarding the early Lawson systems that was relatively unique,
14 and so, sure, obviously the name Lawson is a name, I guess, I
15 have to admit, we could have identified earlier, but we've got
16 a lot of employees, and it wasn't necessarily intuitive that
17 you'd go to the CEO to talk about prior art related issues.

18 THE COURT: Well, it is to me intuitive.

19 MR. McDONALD: (Inaudible) in the course of talking
20 to people that we identified him.

21 THE COURT: Well, it is to me. It's certainly
22 intuitive you'd talk to the founder of the company about the
23 system that he's using, and he's the one who helped develop it
24 and pay for it, for Pete's sake. This is another situation
25 where -- where is this deposition?

1 MR. McDONALD: We would be bringing it to Virginia.

2 THE COURT: Well, I'm not sure he's going to be
3 allowed to testify, but I'll have to abide the event and let
4 you all brief that later. You can depose him, Mr. Robertson.
5 If you need some extra time because of all these late
6 witnesses, you are certainly -- I'll extend the time for you.

7 MR. ROBERTSON: I understand, Your Honor. I
8 appreciate that. Obviously we think that, you know, Mr. Lawson
9 should have sprung to their mind immediately, and, you know,
10 but, again, I think they're trying to backdoor this Lawson 6.0
11 version.

12 THE COURT: The Lawson 6.0 version is not in as prior
13 art unless it was listed among the prior art that was filed on
14 April 9th. Was it or wasn't it?

15 MR. ROBERTSON: No, it wasn't, Your Honor.

16 THE COURT: Well, that's that simple.

17 MR. McDONALD: We dispute that, Your Honor. The
18 document will speak for itself. I understand you can't decide
19 that now when we're both saying opposite things.

20 THE COURT: I have to see more about it, but I can
21 tell you one thing. If it's not in that answer, that
22 disclosure, it's not coming in. I'll leave it for another day,
23 a motion in limine to be dealt with or a motion later in
24 connection with summary judgment or whatever I have to do to
25 consider what it is the facts may be on that particular

1 question, but the bottom line is if he wasn't told -- if he
2 wasn't -- if that system wasn't disclosed, there's going to be
3 no discussion about it. All right -- as prior art. All right,
4 what else? Anything else?

5 Basically then we've resolved the disputes; is that
6 right? You're going to go take the depositions. Do you want
7 some more time, Mr. Robertson?

8 MR. ROBERTSON: Yes, Your Honor. In fact, what I'd
9 like, with the Court's indulgence, is I need to caucus with
10 some of my colleagues. There may be two or three rebuttal
11 witnesses to the witnesses that Your Honor has permitted the
12 depositions to go forward that may need to be called, because
13 they dispute what some of these individuals will be
14 representing about some of the prior art in the systems that
15 are involved.

16 THE COURT: Okay.

17 MR. ROBERTSON: Obviously if I had the opportunity to
18 take the depositions earlier, I might have uncovered additional
19 witnesses, but I'll have to see what comes out in the
20 depositions as I move forward, Your Honor, and I'll bring that
21 to the Court's attention at the earliest opportunity.

22 So I guess that's where we find ourselves. We've got
23 to wrap up. I do need a little bit more time, Your Honor, in
24 order to get this done, and my expert report on validity is due
25 June 3rd, and apparently I'll be taking depositions through

1 May 20th and beyond.

2 THE COURT: No, no, wait a minute. All these people
3 are going to be made available in one location at a time that
4 is convenient. That's these nine people I guess we're talking
5 about. When are you taking those depositions?

6 MR. McDONALD: This is McDonald, Your Honor. We have
7 already been in negotiations with ePlus to set up their
8 depositions, but many of these people are third parties not
9 affiliated at all with Lawson or any party, and we can't make
10 them go anyplace other than where they live.

11 That's part of why we need depositions of these
12 people. We have already developed dates. All of the dates I
13 think we've got for all the witnesses go up to and before
14 May 18th, but if we do need to bleed past that, we'll certainly
15 work with counsel for ePlus to accommodate that, but we cannot
16 make them all available in one location. We have no power to
17 do that.

18 THE COURT: You can do that, Mr. McDonald. You can
19 do it. All you have --

20 MR. McDONALD: How could I do that?

21 THE COURT: You go to them and you tell them you'd
22 like them to come to a nice place to have their deposition
23 taken, and you'll fly them there and back. That's how you do
24 it. You'll be nice to them and give them a nice hotel room,
25 and then everybody goes -- then the other side doesn't have to

1 pay the price for all this late work that you've been doing,
2 and if they don't want to come, then the deposition has to be
3 held where it can be held under the federal rules. I'm aware
4 of that.

5 MR. McDONALD: I understand that. We can at least
6 make that effort, Your Honor. We will certainly do that.

7 MR. ROBERTSON: Your Honor, this is Mr. Robertson.
8 If I'm not mistaken, most, if not every single one, of these
9 witnesses that have been late-identified by Lawson are
10 consultants and are being paid an hourly rate.

11 THE COURT: Is that right, Mr. McDonald?

12 MR. McDONALD: We've got some agreements with some of
13 them which is certainly going to give us that additional
14 leverage to get them to a location. That's true. We don't
15 have agreements with all of them.

16 THE COURT: If you have agreements with somebody, you
17 bring them to Mr. Robertson to testify, because they are under
18 your control, or they don't testify. If they are paid
19 consultants, they come where it's right for them to come. If
20 they're not paid consultants, then the rules are different; all
21 right? Do you understand?

22 MR. ROBERTSON: Your Honor, just one last thing I'd
23 like to ask, before the depositions if Mr. McDonald could
24 forward all those consultancy agreements to me so I can
25 understand the hourly rate that these witnesses are being paid.

